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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1750

HAROLD D. STUMP, JOHN HINES, M.D.,
HARRY M. COVELL, M.D., and WARREN G. SUNDAY,
Petitioners,

v.

LINDA KAY SPARKMAN and LEO SPARKMAN,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE NATIONAL CENTER FOR LAW AND THE HANDICAPPED, INC. AMICUS CURIAE

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The National Center for Law and the Handicapped, Inc., respectfully moves for leave to file the attached brief as *amicus curiae* in this case. The consent of the attorney for respondents has been obtained. The consents of the attorneys for the petitioners were requested but refused.

The National Center for Law and the Handicapped, Inc., was established in July, 1972, to advocate for the legal rights of all handicapped individuals through the

provision of legal assistance, legal and social science research activities, and programs and processes of education and professional awareness.

The Center has been jointly funded by the Bureau of Education for the Handicapped, Office of Education, and as a project of national significance by the Developmental Disabilities Office, Office of Human Development, of the United States Department of Health, Education, and Welfare. Its sponsoring agencies are the National Association for Retarded Citizens, the Family Law Division of the American Bar Association, the University of Notre Dame School of Law, and the Council for the Retarded of St. Joseph County (Indiana).

Assistance for disabled individuals is provided directly through legal intervention in selected cases and indirectly through consultation with attorneys, organizations, and individuals considering or involved in litigation. The Center has been admitted in numerous cases, serving primarily in the role of *amicus curiae*.

Research activities are broad-based and multi-disciplinary in nature. These activities have enabled the Center to develop a familiarity with the general problems faced by mentally retarded persons in everyday life, as well as with specific problems encountered vis-a-vis proposed sterilization procedures.

This case raises significant issues which will greatly affect the legal rights of handicapped citizens. Historically, handicapped citizens have been especially vulnerable to the use of involuntary sterilization.

As a result of its work and experience, the Center is in a position to present this Court with important and relevant information concerning the historical uses of sterilization and its applicability to the mentally retarded as a group.

In addition, the Center's brief provides information on the condition of mental retardation, clarifying misconceptions and erroneous concepts that still plague those labeled mentally retarded.

Finally, the Center is in a unique position to analyze previous court decisions from a public policy perspective and to analyze the potential impact upon handicapped persons of the case at Bar.

Amicus believes this information is relevant to the Court's consideration of this matter. The information presented is, *amicus* believes, of the type neither party will be presenting.

Respectfully submitted,

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BRIEF OF THE NATIONAL CENTER FOR LAW AND THE HANDICAPPED, INC. AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The National Center for Law and the Handicapped was established in July, 1972, to advocate for the legal rights of all handicapped individuals through the provision of legal assistance, legal and social science research activities, and programs and processes of education and professional awareness.

The Center has been jointly funded by the Bureau of Education for the Handicapped, Office of Education, and as a project of national significance by the Developmental Disabilities Office, Office of Human Development, of the United States Department of Health, Education, and Welfare. The Center's sponsoring agencies are the National Association for Retarded Citizens, the Family Law Division of the American Bar Association, the University of Notre Dame School of Law, and the Council for the Retarded of St. Joseph County (Indiana).

Assistance for disabled individuals is provided through direct legal intervention in selected cases and indirectly through consultation with attorneys, organizations, and individuals considering or involved in litigation. The Center has been admitted in numerous court cases, serving primarily in the role of *amicus curiae*.

The legal and social science staff also provides assistance to attorneys, legislators and various organizations working in areas involving the disabled through consultation, legal research and the drafting of model pleadings and briefs.

Research activities of the legal and social science staff are broad-based and multi-disciplinary in nature. They have been designed to facilitate legal reform and to allow a fuller realization of the legal rights of the handicapped.

QUESTIONS PRESENTED BY *AMICUS*

1. Whether, absent specific statutory authority, a court has jurisdiction to authorize sterilization?

2. Whether, assuming judges have jurisdiction to order sterilization for members of certain classes of persons, the allegation that a person is "somewhat retarded" is sufficient to bring the person within any such class?

3. Whether judicial immunity should be abrogated when a judge's actions have totally eliminated an individual's right of appeal?

STATEMENT OF THE CASE

In 1971 Ora McFarlin presented to Judge Harold D. Stump of the Circuit Court of DeKalb County, Indiana, a petition asking the court to order the sterilization of her 15 year-old daughter, Linda Sparkman. The petition contained an affidavit by Ora McFarlin stating that Linda was "somewhat retarded" and "has been passed along with other children in her age level" in school. The reason alleged for requesting the court's authorization to proceed with the sterilization was to "prevent unfortunate circumstances."

Judge Stump signed the petition, thus ordering the sterilization. He did not hold a hearing, appoint counsel or a guardian ad litem for Linda Sparkman, nor did he notify her of the petition or his subsequent Order. Because she was totally unaware of Judge's Stump's actions, Linda Sparkman had no opportunity to appeal his Order.

Linda Sparkman was subsequently brought to a hospital and a tubal ligation was performed. She still did not know the true purpose of the hospitalization and was, in fact, informed that the operation was to remove her appendix. Linda Sparkman finally discovered the true nature of the action in 1975, as the result of the difficulties which she and her husband were encounterin their attempts to conceive a child.

Linda Sparkman and her husband subsequently brought a suit in federal court for damages under 42 U.S.C. §§ 1983 and 1985(3) against Judge Stump, the doctors, the hospital and her mother. The complaint charged that Linda Sparkman had been deprived of her constitutional

right to procreate. The suit was dismissed by the United States District Court for the Northern District of Indiana, Fort Wayne Division. The District Court held that the sole basis for state action necessary to provide federal court jurisdiction was the actions of Judge Stump, but that Judge Stump was protected by absolute judicial immunity.

Upon appeal, the Court of Appeals for the Seventh Circuit unanimously reversed the decision, finding that Judge Stump lacked jurisdiction in his actions and therefore, was not entitled to absolute immunity.

SUMMARY OF ARGUMENT

Sterilization is not an everyday occurrence. It is a drastic procedure which has extreme consequences. Absent specific legislation authorizing sterilization, judges have no jurisdiction to order sterilization for any person.

In Part I of this brief, *amicus* illustrates the history of the eugenics movement which is replete with examples of the abuses which have occurred during the sterilization movement. Genetic and sociological theories, which were never substantiated, led to the passage of numerous sterilization laws and ultimately to the sterilization of countless individuals, most of whom were mentally impaired. The foundation of the movement was ignorance, fear and prejudice.

Paralleling the rise in the social and political acceptance of sterilization in the United States through the early 1930's were developments in Germany. In Germany, as in the United States, sterilization procedures were only applied to those special classes of persons defined by legislation. However, in Germany, these laws were expanded by the judiciary, and they were eventually ignored. Judges gained absolute discretion to order sterilization; the only influence on their decision-making

process was the political thinking of the Third Reich. Sterilization eventually gave way to murder and to the use of concentration camps.

Amicus asserts that the right to procreate is a fundamental right which is entitled to substantial constitutional protections. As a safeguard for the right to procreate, *amicus* asserts that, absent specific statutory authorization, a judge does not have authority or jurisdiction to order sterilization.

In Part II of this brief, *amicus* shows that historically sterilization has only been legislatively authorized as to certain specific classes of persons, which have frequently included persons who are mentally retarded. Sterilization laws have been based upon a genetic rationale of preventing "unfit" offspring and a sociological rationale that certain classes of individuals make "unfit" parents.

Amicus explores the rationales for the sterilization of mentally retarded individuals and refutes their validity. Genetic factors are linked to only a very small portion of mentally retarded children, and numerous "normal" persons carry "defective" genes which can lead to mental retardation in their offspring. Studies of marriages involving mentally retarded persons illustrate that mentally retarded persons are not necessarily less fit parents than persons who are not mentally retarded.

Amicus concludes that, even assuming a judge has jurisdiction to authorize sterilization for a limited and special class, such as the mentally retarded, the mere allegation that a person is "somewhat retarded" is insufficient to justify the inclusion of that person in the class. Mental retardation is a complex condition which is based upon significantly subaverage intellectual functioning and substantial impairment of adaptive behavior. Diagnosis must always be carefully made by experts and cannot be left to lay persons. *Amicus* notes that the

allegation in the original proceeding before Judge Stump, that Linda Sparkman advanced with children of her own age in school, casts substantial doubt on whether she is, in fact, mentally retarded.

In Part III of this brief, *amicus* submits that, even if a judge has jurisdiction to authorize sterilization, the facts of the case at Bar clearly destroy the rationale for clothing Judge Stump with judicial immunity. *Amicus* reads the Court's previous decisions on judicial immunity, and on other official immunities, as traditionally resting upon a balancing of interests among judges, or other public officials, the public and the individual.

Amicus asserts that in each case in which immunity has been granted for the protection of judges and the interests of the public, immunity was only granted after a careful balancing of those interests against the available protections afforded the individual through a judicial right to appeal. In each of the Court's earlier cases upholding judicial immunity, the actions of the judge in question, no matter how arbitrary or capricious, were always subject to a review on appeal. Likewise, in each such instance, the individual could be restored to his former condition through the appellate process.

Amicus asserts that the case at Bar is distinguishable. Judge Stump's actions were so outrageous as to totally deprive Linda Sparkman of any ability to appeal his judicial fiat. The total lack of procedural due process left Linda Sparkman completely without knowledge of his Order permitting her sterilization and totally without any opportunity to contest or appeal his decision.

Amicus argues that, by abrogating her procedural protections, Judge Stump has no basis upon which to claim the normal protections of judicial immunity. The policy considerations which have always been foremost in the mind of the Court mitigate against shielding Judge

Stump from a civil rights action. *Amicus* believes that where, in an isolated and extremely rare and abusive case, a judge's actions have a catastrophic effect upon an individual and where the judge's actions are clearly injurious to the public interest, judicial immunity is an inappropriate defense in an action for damages.

ARGUMENT

I. STERILIZATION IS A DRASTIC, RADICAL AND IRREVERSIBLE PROCEDURE AFFECTING THE FUNDAMENTAL RIGHT TO PROCREATE WHICH IS SUBJECT TO SUCH DANGEROUS ABUSE THAT, ABSENT SPECIFIC STATUTORY AUTHORITY, NO COURT HAS JURISDICTION TO AUTHORIZE IT.

A. The History of the Eugenics Movement Illustrates the Dangers Inherent in the Development and Authorization of Involuntary Sterilization.

Francis Galton was an Englishman of letters and science who, in the late Nineteenth Century, conceived of eugenics as a social science based on human heredity and Darwinian evolution.[1] The word "eugenics" is from the Greek for "well-born" and for Galton it meant "the study of all the influences under social control which may improve or impair the unborn qualities of future generations of man either physically or mentally."[2] His goal was to encourage the procreation of better offspring who fitted by heredity, would lead successful and constructive lives.[3] As for heredity, he espoused the theory of acquired characteristics.[4]

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[1] Pickens, Eugenics and Progressives 23, 37 (1968) (hereinafter cited as Pickens).

[2] Whitney, The Case for Sterilization 38 (1934) (hereinafter cited as Whitney).

[3] Brown, An Introduction to Eugenics 19 (1935) (hereinafter cited as Brown).

[4] Pickens, *supra* note 1, at 37.

By 1900, Galton's ideas had spread to the United States.[5] However, his concept of the inheritance of acquired characteristics was rejected by the new American eugenists who, under the guidance of their leader, Charles Davenport, used instead Gregor Mendel's genetic theory of heredity to advance Galton's social philosophy.[6] The program was designed to accomplish dual goals: (1) to improve the race; and (2) to relieve the state of an unnecessary burden by restricting the birth of mental and moral defectives.[7] By 1915 the thesis that hereditary transmission in accord with the Mendelian formula determined mental defects was supported by a growing number of "scientists." [8]

Because American eugenists felt that the prudential check (voluntary family limitation) was prejudicial to the better classes of citizens and the misery check (war and starvation) was not enough to control the transmission of mental defects, an additional solution was advocated—sterilization.[9] Emphasizing social economy, the Chicago Tribune called for the sterilization of defectives and habitual criminals.[10] Another leading proponent of sterilization spoke of the mentally incompetent person as a "half-man" whose major characteristics were "as-

[5] *Id.* at 36.

[6] *Id.* at 50.

[7] The Bureau of Analysis and Investigation: Its Purpose and Field, Eugenics and Social Welfare Bulletin #1, State of New York State Board of Charities, Department of State and Alien Poor 2-3 (1912).

[8] Robinson & Robinson, The Mentally Retarded Child: A Psychological Approach 216 (1965).

[9] Pickens, *supra* note 1, at 28.

[10] *State* v. *Feilen*, 126 P. 75, 77 (1912).

tonishing fecundity" and a general irresponsibility which created increased demands on charity.[11]

Meanwhile, eugenists established an organizational structure for spreading their gospel of sterilization among the American people. Its origins were in the American Breeder's Association which was founded in 1903 by plant and animal breeders who were desirous of keeping in touch with the new science of breeding. This organization soon shifted its focus to mankind, and in 1913 its name was changed to the American Genetic Association.[12]

Considering the biological orientation of both eugenics and sterilization, it was little wonder that they were linked, during the early years of this century, into one movement by tough minded reformers. Davenport, for example, urged that a sterilization program be initiated before the unfit—by means of altruism and sentimental charity—increased and, in time, controlled society.[13] The same concern was raised by Justice Holmes in *Buck* v. *Bell* [14] when he expressed the belief that sterilization was necessary "in order to prevent our being swamped with incompetence." [15]

Sterilizations were performed in a state institution as early as 1899,[16] but it was 1907 before the first state

[11] Humphrey, *The Menace of the Half-Man*, XI J. of Heredity 228-32 (1920).

[12] Brown, *supra* note 3, at 18.

[13] Pickens, *supra* note 1, at 59.

[14] 274 U.S. 200 (1927).

[15] *Id.* at 207.

[16] Gosney & Popenoe, Sterilization for Human Betterment 15 (1929) (hereinafter cited as Gosney & Popenoe).

passed a sterilization law.[17] By January 1, 1933, thirty states had enacted sterilization legislation.[18] While uniformly providing for the sterilization of the mentally ill and mentally retarded, these statutes frequently also included other "undesirables" in the subject groups.[19] Under the authority of these laws, 16,066 persons were reported as having been sterilized by January 1, 1933.[20] Included in this total figure of persons sterilized are 275 men who were castrated and 85 women who had their ovaries removed[21]—despite the fact that both the vasectomy and tubal ligation procedures were known prior to 1900.[22]

One additional aspect of the eugenics-sterilization movement should be recognized—it was explicitly and un-

[17] Landman, Human Sterilization 291 (1932).

[18] Woodside, Sterilization in North Carolina 194 (1950) (hereinafter cited as Woodside). These states were: Alabama, Arizona, California, Connecticut, Delaware, Idaho, Indiana, Iowa, Kansas, Maine, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin.

[19] Laughlin, Eugenical Sterilization: 1926, at 18-50 (1925) (hereinafter cited as Laughlin). Individuals in the subject groups included: rapists (Indiana, Washington, New Jersey, New York); habitual criminals (Washington, California, New Jersey, Nevada, New York, Oregon, Idaho, Utah); epileptics (Washington, Iowa, Kansas, Wisconsin, Oregon, Montana, Delaware, Virginia, Idaho, Utah); moral degenerates (Washington, Oregon, Idaho); sex perverts (California, Iowa, Oregon, Idaho); life prisoners (California); drunkards (Iowa); drug fiends (Iowa); syphilitics (Iowa); white slavers (Iowa); and, those convicted of a felony involving moral turpitude (Kansas).

[20] Brown, *supra* note 3, at 142-43. By January 1, 1949, the figure increased to 49,207 people. Woodside, *supra* note 18, at 194.

[21] Brown, "Eugenic Sterilization in the United States," 2380 *The Annals of the American Academy of Political and Social Science* 10 (1930); Laughlin, *supra* note 19, at 60.

[22] Gosney & Popenoe, *supra* note 16, at 71, 77-78.

abashedly racist. Galton believed that Blacks were inferior because their ancestral habits had furnished them with inadequate natures.[23] Davenport, the leading eugenist in America, wrote that Blacks were members of a different and elementary species and that race mixing was "socially evil."[24] Paul Popenoe's call for "race purification" was heard in this country even before that cry echoed across Nazi Germany.[25] He believed Blacks to be inferior people and racial intermarriage biologically wrong.[26]

Popenoe also considered Mexicans and Indians to be of a lower intelligence than Whites and urged that all immigrants be carefully screened for "good family stock" and "biological quality."[27] Leon Whitney, the Executive Secretary of the American Eugenics Society, wrote that "the foreign-born furnish in some cases as much as six times as many feeble-minded as natives do."[28] Harry Laughlin, who was on the staff of Davenport's Eugenics Record Office and who served as an expert witness in *Buck* v. *Bell*,[29] felt it was imperative that American women keep the nation's blood pure by not marrying Blacks; in a study commissioned by the federal govern-

[23] Galton, Hereditary Genius: An Inquiry Into Its Law and Consequences 336 (1870).

[24] Davenport, The Presidential Address: The Development of Eugenics 22, cited in Pickens, *supra* note 1, at 56.

[25] Gosney & Popenoe, *supra* note 16, at 131.

[26] Popenoe & Johnson, Applied Eugenics 284-85, 297 (1933). "[T]he more white blood a colored person has, the better is likely to be his rating on an intelligence test." *Id.* at 297.

[27] *Id.* at 283, 291.

[28] Whitney, *supra* note 2, at 147-49 (1934).

[29] Pickens, *supra* note 1, at 65; Whitney, *supra* note 2, at 160.

ment, he also succeeded in tying social degeneracy to the immigration of Southern Europeans.[30]

In 1933, six years after the Supreme Court approved of compulsory sterilization in *Buck* v. *Bell*, Germany passed its first sterilization laws which were to be enforced by Hereditary Health Courts.[31] In both law and science, the United States and Germany almost simultaneously embraced eugenic sterilization. However, at the same time, two different personalities emerged to lead their countries for the next decade, Roosevelt in the United States and Hitler in Germany. By 1937, 225,000 persons had been sterilized by the Nazi regime.[32]

Initially, sterilization statutes in Germany limited sterilization to certain select classes of persons. The jurisdiction of the judiciary was limited to authorizing sterilization only for members of specific classes, which included "the 'feeble-minded,' drug addicted, alcoholic, sex delinquent and those with 'grossly offensive body deformities.'" [33] However, by the late thirties, judges began to apply sterilization to additional classes, in line with the political beliefs of the Third Reich. The original classes expanded to include other groups at judicial whim. Soon those with cleft palates, cleft jaws or harelips and those who were severely hard of hearing came under the judges' jurisdiction.[34] Finally, attempts were made to extend jurisdiction to all those considered "asocial." These attempts failed; instead the "asocial" were sent to concentration camps.[35]

[30] Pickens, *supra* note 1, at 65, 67. This study actually influenced the formulation of immigration law in 1924. *Id.* at 65. *See generally*, Sarason and Doris, Phychological Problems in Mental Deficiency 310-11 (1969).

[31] Pickens, *supra* note 1, 98-99.

[32] Kopp, *Eugenics Laws in Europe*, 34 Am. J. Ob. Gyn. 449 (1937).

[33] Bower, Eugenic Sterilization in Germany and the United States 30 (1973) (hereinafter cited as Bower) (on file in the library of the National Center for Law and the Handicapped, Inc.). The author performed substantial research of German documents and wrote a comprehensive treatise on the growth in popularity of sterilization during the Nazi regime.

One author has described the culmination of the uncontrolled eugenics-sterilization movement in Germany.

> By 1940, even the broadened Nazi laws were ignored. Sterilization for eugenic purposes was no longer used. Rather, between October, 1939 and August, 1941, 3,000 malformed children and 100,000 inmates of public hospitals were put to death. By the summer of 1941, Freisler circulated a proposed law for 'mercy killing.' The law was to be compulsory with respect to the mentally impaired. Hitler pronounced it by executive order.[36]

During the height of the Nazi rampage, our Supreme Court issued its decision in *Skinner* v. *Oklahoma*, 315 U.S. 535 (1942). The Court, in recognizing the fundamental right to procreate, could not have avoided comparing the development of sterilization in the United States with the horrors that ungoverned and unaccountable sterilizations were causing in Germany. Justice Douglas, writing for the Court, stated:

> We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching, and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear.

Id. at 541.

[34] *Id.*

[35] *Id.* at 31.

[36] *Id.*

The United States handled the eugenics movement by the passage of sterilization laws in individual states. Many of these statutes were struck down.[37] Others were narrowly and strictly construed.[38] Many statutes remained on the books only to be completely ignored or rarely used. Control was maintained, and justice prevailed by adherence to the laws.

Meanwhile, Germany passed broader and broader laws in the 1930's. The judiciary continued the expansion of the laws until, finally, the laws were simply ignored.[39] German eugenics, when left in the hands of judges with unaccountable discretion who were influenced only by the political thinking of the Nazi leaders, went out of control, culminating in tragedy. "By 1941, the mentally impaired in Germany were being destroyed, not sterilized." [40] It is a sobering thought that "basically, only a different judicial and political atmosphere distinguished American and German attitudes toward eugenics in the Thirties." [41]

B. The Right of an Individual to Procreate Is a Fundamental Constitutional Right.

This Court has on numerous occasions recognized that an individual's right to have children, or to choose not to have children, is a fundamental right protected by the Constitution. *Roe* v. *Wade*, 410 U.S. 113 (1973); *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942).

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[37] Brakel & Rock, The Mentally Disabled and the Law 208 (1971).

[38] *Id.* at 209.

[39] Bower, *supra* note 33, at 36.

[40] *Id.*

[41] *Id.* at 37.

The fundamental nature of the right of procreation was first recognized by this Court in *Skinner* v. *Oklahoma*. In that case, this Court found that an Oklahoma statute which required the involuntary sterilization of convicted larcenists, but not requiring the same for convicted embezzlers, violated the Equal Protection Clause of the Fourteenth Amendment.

Writing for a majority of the Court, Justice Douglas explained why the essential nature of procreation makes it such a fundamental right:

> This case touches a sensitive and important area of human rights. Oklahoma deprives certain individuals of a right which is basic to the perpetration of a race—the *right to have offspring*.
>
> . . .
>
> Marriage and *procreation* are *fundamental* to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty.

316 U.S. at 536, 541 (emphasis added).

More recently, the Court underscored the fundamental nature of the right of procreation in the related contexts of contraception and abortion. In *Griswold* v. *Connecticut*, the Court struck down a Connecticut statute which made it unlawful for married couples to use contraceptives. The focus of the Court's opinion was on the intimacy of the marital relationship itself, holding that it was protected by a "zone of privacy created by several fundamental Constitutional guarantees." 381 U.S. at 485. In writing the opinion of the Court, Justice Douglas referred to

the First, Third, Fourth, Fifth and Ninth Amendments as sources of these "fundamental Constitutional guarantees," and then concluded that the right involved is "a right of privacy older than the Bill of Rights." *Id.* at 486.

Seven years later, in *Eisenstadt* v. *Baird*, the Court made it clear that the right of privacy, which protects the fundamental decision whether or not to have children, is not limited to the marital relationship. A Massachusetts statute prohibiting the distribution of contraceptives to unmarried persons was held to violate the Equal Protection Clause of the Fourteenth Amendment. Speaking for the Court, Justice Brennan addressed the emphasis which the *Griswold* Court placed on the marital relationship and expressly rejected the notion that the right of privacy is honored only in that relationship:

> If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so *fundamentally affecting a person as the decision whether to bear or beget a child.*

405 U.S. at 453 (emphasis added).

Finally, in its landmark decision in *Roe* v. *Wade*, the Court determined that the right of privacy was broad enough to encompass a woman's decision to terminate her pregnancy. The Court, in an opinion by Justice Blackmun, held that a Texas statute imposing a criminal penalty for abortion violated the Due Process Clause of the Fourteenth Amendment. In discussing the rights which are protected by the zone of privacy, the Court made it clear that "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' are included in this guarantee of personal privacy." 410 U.S. at 152. The Court goes on to list procreation as one of those activities to which the protection of the right of personal privacy attaches.

The sterilization procedure authorized for Linda Sparkman irreversibly infringed upon her right "to bear or beget a child." *Amicus* asserts that the right to be free from involuntary sterilization is no less fundamental than the right to use contraceptives or to seek an abortion. Judge Stump's Order, which completely foreclosed any opportunity for Linda Sparkman to exercise her fundamental right, must be strictly scrutinized by this Court.

C. Judges Do Not Have Jurisdiction to Authorize Sterilization Absent the Existence of State Statutes Authorizing Such Action.

Several courts have considered the question of a judge's jurisdiction to authorize sterilization. These courts have repeatedly found that, unless a statute specifically authorizes the procedure, judges have no jurisdiction to order sterilization.

The leading case involved a state probate court judge who authorized the sterilization of a mentally retarded girl and who was subsequently sued for his action. *Wade* v. *Bethesda Hospital*, 337 F. Supp. 671 (S.D. Ohio 1971). The judge moved to dismiss the action based upon judicial immunity. However, the district court held that sterilization was outside the scope of his jurisdiction.

> There is no statute in Ohio which authorizes a judge to order sterilization for any purpose. Nor has this court been able to discover any judicial precedent for such an order in the absence of a specific statute.

Id. at 673-74.

The court asserted that jurisdiction to order sterilization procedures must emanate from a specific legislative enactment. Recognizing that the Ohio legislature had refused to enact laws to authorize sterilization, the

Wade court held that judicial immunity could not shield the probate judge from liability.[42]

The Supreme Court of Missouri has reversed a lower court decision authorizing the sterilization of a mentally retarded girl. *In Interest of M.K.R.*, 515 S.W.2d 456 (Mo. 1974). The Court considered the applicable jurisdictional statutes and concluded that:

> [T]he provisions of one of the sections of the juvenile code referred to by petitioner confer on the juvenile court the jurisdiction and power to order or authorize the sterilization of a child. And we find no section of the code which does. Nor for that matter do we find any constitutional or statutory provision empowering any court in this state to order the involuntary sterilization of any person.

Id. at 470.

Recognizing the fundamental nature of the Constitutional right involved, the court distinguished sterilization from other routine or emergency surgical procedures.

> The courts are not faced in this case with a prayer for a judgment authorizing ordinary medical treatment, or radical surgery necessary to preserve the life of a child; we are faced with a request for sanction by the state of what no doubt is a routine operation which would irreversibly deny to a human being a fundamental right, the right to bear or beget a child. Jurisdiction of the juvenile court to exercise the awesome power of denying that right may not be inferred from the general language of the sections of the code to which we have referred. Such jurisdiction may be conferred only by specific statute.
>
> Whatever might be the merits of permanently depriving this child of this right, the juvenile court may not do so without statutory authority—authority which provides guidelines and adequate legal safeguards determined by the people's elected representatives to be necessary after full consideration of the constitutional rights of the individual and the general welfare of the people.

Id. at 470-71.

In *Frazier* v. *Levi*, 440 S.W.2d 393 (Tex. Ct. Civ. App. 1969), the court refused to authorize the sterilization of a mentally retarded woman which was requested by her guardian for social and economic reasons. In this case of first impression in Texas, the court concluded that jurisdiction to authorize sterilization had not been granted to the court by any provision of the Texas Constitution or by any statute. Similarly, in *Holmes* v. *Powers*, 439 S.W.2d 579 (Ky. Ct. App. 1969), the court concluded that neither statute nor common law granted jurisdiction to sterilize a mentally retarded woman.

When the Indiana Court of Appeals faced this issue, the court concluded:

> We believe the common law does not invest parents with such power over their children even though they seriously believe the child's adulthood would benefit therefrom.

A.L. v. *G.R.H.*, 325 N.E.2d 501, 502 (Ind. Ct. App. 1975). Thus the Indiana court concluded that it had no authority to authorize sterilization. The court, in reaching its decision, considered two factors:

> [First,] we are not dealing with a legislative enactment permitting sterilizations without consent where certain conditions exist.

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[42] The court also noted that the operation was performed before the expiration date for an appeal; however it did not reach any issue arising from that fact in light of its decision on the lack of the judge's jurisdiction. 337 F. Supp. at 674. For a further discussion of the effect of the lack of a right to appeal, *see* Part III, *infra*.

> Secondly, the facts do not bring the case within the framework of those decisions holding either that the parents may consent on behalf of the child to medical services necessary for the child or where the state may intervene over the parents' wishes to rescue the child from parental neglect or to save its life.

Id.

A.L. v. *G.R.H.* was relied upon by the court in *In Re Lambert*, Civ. No. 61156 (Tenn. Prob. Ct. March 1, 1976). There, a Tennessee statute permitted sterilization with the consent of the person to be sterilized. However, no legislation existed to authorize sterilization for persons who were incompetent to give consent to the procedure. The court concluded that it did not "have the jurisdiction or authority to empower the petitioner [the mother] to have the operation here requested." Slip op. at 8.

Even in states which have legislatively permitted sterilization, the courts which have construed the statutes have taken care to insure that the fundamental rights of individuals subjected to the reach of the statutes have been afforded appropriate protections against abuse. In *Wyatt* v. *Aderholt*, 368 F. Supp. 1382 (M.D. Ala 1973) (per curiam), a three-judge panel declared Alabama's sterilization statute unconstitutional. In a companion opinion, Judge Frank Johnson issued strict guidelines to control proposals to sterilize institutionalized mentally retarded persons. *Wyatt* v. *Aderholt*, 368 F. Supp. 1383 (M.D. Ala. 1974). These included the prohibition of sterilization for those under 21, except in medical emergencies, and the requirement of personal informed consent for those over 21. To protect mentally retarded individuals from the abuses of the sterilization process which had previously existed in the Alabama institutions, *Wyatt* ordered that sterilizations only occur after a

review committee finds both that the individual has a genuine, uncoerced desire to be sterilized and that the procedure is in the person's best interest. Even where sterilization is authorized by the committee, it is still subject to court review.

The most recent judicial scrutiny of an involuntary sterilization statute occurred in *North Carolina Association for Retarded Children* v. *North Carolina*, 420 F. Supp. 451 (M.D. N.C. 1976). While the three-judge federal court upheld most of the North Carolina statute, it did so by requiring that very stringent standards and procedures be adhered to. The court's standards mandate a finding that the best interest of the mentally retarded person or society will be served and a finding that the mentally retarded person is likely to engage in sexual activity without the use of contraceptive devices. It must then be shown that the individual in question either is likely to procreate a "defective" child or is likely to be unable to care for a child. The procedural safeguards assured in *North Carolina Association for Retarded Children* include: the right to counsel, including court-appointed counsel in the case of indigency; involvement of a parent, guardian or guardian ad litem; the right to sufficient notice of the hearing for the mentally retarded person and his or her natural or legal guardian; the right to present evidence; and, the right to cross-examine adverse witnesses. A right of appeal to the superior court for a trial de novo before a jury is explicitly provided for, as well as the right to pursue further appeals.

The necessity for the strict statutory safeguards assured by the North Carolina court's decision is underscored by a specific finding of fact of the three-judge federal court.

> Most competent geneticists now reject social Darwinism and doubt the premise implicit in Mr. Justice Holmes' incantation that ". . . three genera-

> tions of imbeciles is enough." . . . We think it is a fair statement, from the expert testimony we have heard and read, to say that the best opinion presently is that rarely would a competent doctor recommend involuntary sterilization—but that he might do so in an extreme case. . . . In short, the medical and genetical experts are no longer sold on sterilization either to benefit retarded patients or the future of the Republic.

Id. at 454.

The line of cases holding that judges, absent a specific statutory authorization, do not have the jurisdiction to order the sterilization of any individual and the cases which narrowly construe statutory enactments providing for the involuntary sterilization of individuals have, as a common bond, the goal of minimizing the use of sterilization procedures. This goal reflects the recognition by these courts that the right to procreate is a fundamental right which requires substantial judicial protection to ensure that abuses of the sterilization process do not occur. *Amicus* asserts that, in the case at Bar, the actions of Judge Stump ignored the procedural and substantive rights of Linda Sparkman, disregarded the medical and genetic experts, and invaded the province of the legislature in such a manner that Judge Stump imposed his own biases upon Linda Sparkman in a drastic and irreversible manner. *Amicus* asserts that, in so doing, Judge Stump acted without jurisdiction and that judicial immunity is, therefore, not available to him as a defense in an action for damages.

II. EVEN IF JUDGES HAVE JURISDICTION TO ORDER STERILIZATION FOR MEMBERS OF CERTAIN CLASSES OF PERSONS, THE ALLEGATION THAT A PERSON IS "SOMEWHAT RETARDED" IS INSUFFICIENT TO BRING THE PERSON WITHIN ANY SUCH CLASS.

A. Sterilization Procedures Have Only Been Applied to Special Classes of Persons.

Throughout history, only certain classes of persons have been singled out to be subject to involuntary sterilization. The rationale for the sterilization of members of such classes has been based upon two premises: the genetic argument that "unfit" individuals should be restrained from reproducing their own kind; and the sociological argument that the "unfit" could not be satisfactory parents.[43]

Sterilization laws have primarily focused upon three classes of individuals: mentally retarded individuals (usually mildly or moderately retarded individuals); mentally ill individuals (usually severely impaired); and individuals with epilepsy (anyone with a seizure disorder).[44] Statutes have also extended beyond these groups to include rapists, habitual criminals, moral degenerates, sex perverts, drunkards, drug fiends, syphilitics, white slavers, and individuals convicted of a felony involving moral turpitude.[45]

Amicus asserts that, even if Judge Stump had jurisdiction to order sterilization in some instances, those instances can only be narrowly drawn to correspond with historical practice. For this Court to hold that a judge's

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[43] Bender, *A Geneticist's Viewpoint Towards Sterilization*, 2 Amicus 45, 46 (September, 1977).

[44] *Id.*

[45] Laughlin, Eugenical Sterilization: 1926, at 18-50 (1925).

jurisdiction is not narrowly drawn, this Court would, by necessity, be holding that judges have the general jurisdiction to order sterilization for any individual at any time.

B. The Label of Mental Retardation Has Little Relationship to the Rationale for Sterilization.

Mental retardation is a concept which is widely misunderstood by the general public. Traditionally and, unfortunately even today, to many persons the term connotes an organic condition that is markedly abnormal, irreversible and unchanging. Such despairing negativism can be traced to the previous decades when concepts about mental retardation were considered to be scientifically founded.[46] Such stereotypical notions are now giving way to the increasing acceptance of the developmental model which is premised upon the finding that all persons, including individuals with mental retardation, are capable of continuing growth and development.[47]

As more knowledge has been gained, society has become less assured about mental retardation. As the disciplines of medicine and the social and behavioral sciences increase in their knowledge of the complexities of mental

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[46] *See* Discussion Part IA, *supra*.

[47] Menolascino, Challenges in Mental Retardation: Progressive Ideology and Services 70-71 (1977). Dr. Menolascino describes the developmental model as follows:

> In contrast to the image of the retardate as a sick person, use of the developmental model brings about habilitation of the mentally retarded through the application of positive programmatic principles. The developmental model is a means of bringing about normalization . . . and can be viewed as taking a positive view of the modifiability of human behavior. Further, all mentally retarded persons are perceived as capable of growth, development, and learning, as opposed to the old concept of negative reinforcement of difference from the norm.

retardation, "the less confident we become about our ability to classify individuals [as mentally retarded]." [48]

Despite the fact that the sterilization of mentally retarded individuals is still viewed by some as a means of preventing mental retardation, authorities in the area of mental retardation acknowledge that the causes of mental retardation vary widely. The current beliefs of these experts are that only a very small percentage, perhaps as low as six percent, of mental retardation is an inherited condition, and that for the vast majority of cases a definitive etiology is unknown.[49]

Basically, three different generic causes have been identified: purely genetic, genetic and environmental, and purely environmental.[50] Psycho-social (*e.g.*, cultural-familial) retardation is represented most frequently in the mildly retarded levels and may account for as much as 85 percent of mental retardation.[51] Mental retardation which results from environmental factors, such as trauma or impoverished intellectual or emotional environments, clearly cannot be controlled through sterilization. Some "defects" which are genetically caused can only lead to mental retardation when certain environmental factors such as diet are not controlled.[52] Other means are thus available to prevent this type of mental retardation. Finally,

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[48] Begab, "Preface," in Manual on Terminology and Classification in Mental Retardation ix (1973).

[49] Dunn, *Children With Moderate and Severe General Learning Disabilities*, Exceptional Children in the Schools 6 (2nd ed. 1973) (hereinafter cited as Dunn).

[50] Murdock, *Sterilization of the Mentally Retarded: A Problem or a Solution?*, 62 Calif. L. Rev. 917, 924 (1974) (hereinafter cited as Murdock).

[51] Chinn, Drew and Logan, Mental Retardation 12 (1975) (hereinafter cited as Chinn).

[52] Murdock, *supra* note 50, at 925.

> even retardation resulting solely from inheritance of defective genes cannot be greatly reduced by sterilizing only the retarded, for eighty to ninety percent of retarded offspring are born to normal parents.[53]

If the genetic goals for sterilization were to prevail, sterilization would have to be strictly required for the broad class of persons, both mentally retarded and "normal," who carry and transmit "defective" genes. The class to be sterilized would only include a small percentage of the mentally retarded population, since only a small percentage of that group carry and transmit "defective" genes. No society has yet, even through legislation, attempted to achieve the genetic goal by extending sterilization to broad classes of "normal" persons.

The second rationale for sterilization has been the sociological argument concerning fitness for parenthood. The validity of this rationale as it applies to the mentally retarded as a class has also been challenged by sociological studies.

In a recent survey of the marital status of eighty previously institutionalized mentally retarded persons, the conclusion reached was that "there is no apparent reason, at this state of the study, to prevent any once institutionalized retardates from taking on the responsibilities of marriage and parenthood."[54] This report, while citing the need for future research to assess the long-term status of such marriages, concludes that, even in marriages involving persons institutionalized for more than twenty years, the marriages entered into between mentally retarded persons do not differ substantially in its strengths and weaknesses from marriages entered into between "normal" persons.

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[53] *Id.* at 926.

[54] Floor, Baxter, Rosen & Zisfein, *A Survey of Marriages Among Previously Institutional Retardates*, 13 Mental Retardation 33, 37 (1975).

In a paper prepared in 1974 for presentation at the Region VII Workshop on Family Life Education and Family Planning for the Mentally Retarded, Genevieve Hogg reports on the status of fifteen marriages in which one or both of the spouses had been identified as mentally retarded.[55] In her paper, Hogg provides considerable insight into the everyday life of these marriages and reaches the conclusion that these marriages

> do not support the myth that mentally retarded parents cannot meet the physical and emotional needs of a child throughout the developmental years.[56]

These findings are not dissimilar to the early indications of the work of Phyllis Mickelson.[57] In her study of ninety families in which one or both parents had been adjudged mentally deficient, she concluded that the parents' mental deficiency did not appear to be the sole determinate of the adequacy of child care. The five major factors in determining the adequacy of the parents' care which were concluded to be the most important factors were: the mental health of the parents (especially that of the mother); the degree of harmony between the husband and the wife; the number of pregnancies; the number of children in the home; and, the adequacy of income.[58] Thus, the factors which significantly influenced the "fitness" of mentally retarded parents were the same factors which influence the "fitness" of all parents, including "normal" parents.

In the conclusion of her study two years later, Mickelson's basic finding remained that mental deficiency is

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[55] Hogg, Marriages Among Mentally Retarded in a Community Based Program (1974) (unpublished) (on file in the library of the National Center for Law and the Handicapped).

[56] *Id.* at 5.

[57] Mickelson, *The Feebleminded Parent: A Study of 90 Family Cases*, LI Amer. J. of Ment. Def. 644 (1947).

[58] *Id.* at 653.

not a primary factor in influencing the adequacy of mentally retarded parents.[59] She concludes that "the mentally deficient parent emerges from this study not as a different kind of parent but as a more vulnerable one." [60]

C. The Allegation That a Person Is "Somewhat Retarded" Is Insufficient to Bring That Person Within the Ambit of Any Special Class for Whom Sterilization May Be Authorized.

Even if this Court holds that jurisdiction existed in Judge Stump's court under which he could order sterilization for certain special classes, *amicus* submits that the mere allegation that Linda Sparkman was "somewhat retarded" is not sufficient to invoke that jurisdiction as to her.

The most widely accepted definition of mental retardation is that adopted by the American Association on Mental Deficiency.

> Mental Retardation refers to significantly subaverage intellectual functioning existing concurrently with deficits in adaptive behavior, and manifested during the developmental period.[61]

The Association, acknowledging an increased awareness of the social abilities of persons with lower intelligence, has deleted the category of "borderline retardation" [62] because of the understanding that mental retardation refers to a *significantly* subaverage general intellectual functioning. Such significantly lower level of intellectual

[59] Mickelson, *Can Mentally Deficient Parents Be Helped To Give Their Children Better Care?*, LIII Amer. J. of Ment. Def. 516 (1949).

[60] *Id.* at 532.

[61] Manual on Terminology and Classification in Mental Retardation 5, 11 (1973) (hereinafter cited as Manual).

[62] *Id.*

functioning must be accompanied by behavior that is maladaptive. Following these criteria, the label of mental retardation cannot be applied to those persons who are present in any society and who are simply of a somewhat lower, or "borderline," intelligence. "Intellectual functioning" cannot be estimated, but must be determined by specific types of psychometric assessment.[63] When the label of mental retardation is applied in the absence of such testing, it must be seriously questioned.

With regard to adaptive behavior, there are no generalized behaviors that are specific to mental retardation.[64] Adaptive behavior includes such aspects as self-help skills, personal grooming, communication skills, socialization, personal responsibility, and self-direction.[65] At the school-age level in particular, adaptive behavior also relates to the achievement of success in school or to the maintenance of normal educational progress.[66] Deficits in adaptive behavior refer to difficulties in carrying out tasks, or attaining achievements, which are appropriate to one's chronological age.[67]

Final judgments regarding adaptive behavior can be determined only after consideration of the varied factors which are brought to bear upon the development of the behavior. Assessments of the level of adaptive behavior must be made at fairly frequent intervals because a

[63] *Id.* at 15-16; Chinn, *supra* note 51, at 21; Dunn, *supra* note 49, at 65-66.

[64] Scheerenberger, Deinstitutionalization and Institutional Reform 11 (1976); *see also* Leland, *Mental Retardation and Adaptive Behavior*, 6 J. of Spec. Ed. 71, 76 (1972).

[65] Manual, *supra* note 61, at 12.

[66] Menolascino, Challenges in Mental Retardation: Progressive Ideology and Services 17-18 (1977) (hereinafter cited as Menolascino).

[67] Manual, *supra* note 61, at 11; Chinn, *supra* note 51, at 21; Dunn, *supra* note 49, at 66.

higher level of adaption can be attained through changes in the environment, training, or the natural development of skills.[68] One author has cautioned that viewing behavior as static and irreversible can "lead to drastic proposals concerning euthanasia, forced sterilization or other extreme recourses based on the assumption that the problems can be neither corrected nor modified." [69]

Careful study, use of varied tests, and repeated observation—all carried out by persons trained in relevant disciplines—must be involved prior to the application of the complex label of mental retardation. The assessment process "goes on informally and haphazardly when done by relatives, friends, and acquaintances," [70] and thus an accurate diagnosis of mental retardation cannot occur.

The allegations in the petition presented to Judge Stump were that Linda Sparkman was "somewhat retarded" but that she "attended public school . . . and has passed along with other children in her age level." *Amicus* asserts that it is most unlikely that a child who has progressed through a public school system at the same rate of progress as her age-related peers would demonstrate either an "intellectual functioning" which is *significantly* subaverage or "deficits in adaptive behavior." *Amicus* submits that the factual allegations contained in the petition presented to Judge Stump are, therefore, inadequate to support an ultimate finding that she is mentally retarded.

Additionally, *amicus* asserts that the allegation "somewhat retarded" [71] is totally insufficient to place an indi-

[68] Menolascino, *supra* note 66, at 70-75; Chinn, *supra* note 51, at 21.

[69] Leland, *Mental Retardation and Adaptive Behavior*, 6 J. of Spec. Ed. 71, 77 (1972).

[70] Telford & Sawrey, The Exceptional Individual 186 (1972).

[71] Since no allegation was made that Linda Sparkman fell in the class of "mildly retarded" persons, this Court need not face the

vidual within the ambit of any special class for whom sterilization has traditionally been authorized. A decision by this Court to the effect that Judge Stump had jurisdiction to order Linda Sparkman's sterilization would be a holding that any judge, under the exercise of similar jurisdiction, could order the sterilization of any individual.

III. WHEN A JUDGE'S ACTIONS HAVE TOTALLY ELIMINATED AN INDIVIDUAL'S RIGHT OF APPEAL, JUDICIAL IMMUNITY SHOULD BE ABROGATED.

Amicus asserts that the policy considerations which normally call for judicial immunity under 42 U.S.C.

question whether such a label would be sufficient to bring a person within a class authorized for sterilization. It is, however, relevant that even the more specific label of "mildly retarded," although much more meaningful than "somewhat retarded," is open to serious scrutiny.

> It is also in the mildly retarded range that one finds the largest number of individuals for whom the diagnosis of mental retardation is uncertain.

Hobbs, The Future of Children 52 (1975).

Similarly,

> [a] child with an IQ score within the mild range of mental retardation who is from a low-socio-economic-status group is more likely to be diagnosed mentally retarded than a middle-or-upper-class child with a similar score.

Id. at 29-30. *See also*, The President's Committee on Mental Retardation, Findings (1968), cited in Scheerenberger, Deinstitutionalization and Institutional Reform 15 (1976).

Litigation has also addressed this problem. The court in *Larry P.* v. *Riles*, 343 F. Supp. 1306 (N.D. Cal. 1972), *aff'd* 502 F.2d 963 (9th Cir. 1974), found that IQ tests were culturally biased, thereby causing Black children to be disproportionately labeled as retarded and placed in special education classes. *See also, Diana* v. *California State Board of Education*, C.A. No. C-70 37 RFP (N.D. Cal. February 3, 1970), concerning culturally and linguistically biased IQ-testing, resulting in over-diagnosis of Mexican-American children as mentally retarded.

§ 1983 do not justify the application of judicial immunity in the case at Bar. *Amicus* asserts that the total absence of procedural due process in Judge Stump's court and the lack of an opportunity for Linda Sparkman to appeal the judge's order permitting her sterilization distinguish this case from previous decisions of this Court. Thus, *amicus* argues that the public policy calls for the removal of the shield of judicial immunity under the narrow facts presented in this case.

A. Judicial Immunity Should Be Granted Only After a Careful Balancing of Public Policy and Consideration of the Interests of Judges, the Public, and Individuals.

The doctrine of judicial immunity [72] is a doctrine well-founded in English law, as well as in American law. *Bradley* v. *Fisher*, 13 Wall. 335, 20 L. Ed. 646 (1872). The doctrine dates "back at least to 1608, and is entirely judge-made." [73]

In *Bradley* v. *Fisher*, the first Supreme Court case to enunciate the doctrine of absolute judicial immunity, the Court reviewed prior English law and analyzed the competing interests involved. In considering the interests of judges, the Court acknowledged that judicial actions were complex and that litigation often excited the emotions of the participants. "[I]f a judge could be compelled to answer in a civil action for his judicial acts . . . his office [would] be degraded and his usefulness destroyed." 13 Wall. at 349, 20 L. Ed. at 650. The Court also recognized that absent judicial immunity a judge

[72] *Amicus* has briefed only those portions of cases dealing with personal liability for damages and has not addressed discussions of injunctive relief.

[73] Note, *Liability of Judicial Officers Under Section 1983*, 79 Yale L. J. 322, 323 (1969) (hereinafter cited as Note). The author cites *Floyd* v. *Barker*, 12 Co. Rep. 23 (1608), as an early case.

could be placed in the untenable situation of defending his judicial integrity in every case, noting that the losing party would invariably attack his decision.

From the public's perspective, the Court concluded that "the protection essential to judicial independence would be entirely swept away." 13 Wall. at 348, 20 L. Ed. at 650. The public has long had an interest in maintaining an independent judiciary which can act without fear of coercion or reprisal.

> The public are deeply interested in [judicial immunity], which indeed exists for their benefit, and was established in order to secure the independence of the judges, and prevent them from being harassed by vexatious actions.

13 Wall. at 349, 20 L. Ed. at 650, citing *Fray* v. *Blackburn*, 3 Best & Smith 576 (1863).

In completing the tripartite analysis, the Supreme Court considered the interests of the individual who sought to bring the action. The Court concluded that the individual was not entirely at the mercy of a judge:

> Against the consequences of their erroneous or irregular action, from whatever motives proceeding, the law has provided for private parties numerous remedies, and to those remedies they must, in such cases, resort.

13 Wall. at 354, 20 L. Ed. at 650.

Subsequent to the passage of 42 U.S.C. § 1983, courts differed as to the effect of judicial immunity on this statute.[74] In 1967, the Supreme Court held for the first time that the doctrine of absolute judicial immunity would be applied to actions under that statute. *Pierson* v. *Ray*, 386 U.S. 547 (1967).

[74] *See Pierson* v. *Ray*, 386 U.S. 547, 550 (1967); Note, *supra* note 73, at 324.

In *Pierson* the Court based its decision upon the following policy analysis:

> It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation.

Id. at 554.

Thus, almost one hundred years after *Bradley* v. *Fisher*, the Supreme Court still sought to balance the competing interests: the judge's interest in avoiding situations whereby losing parties challenge his integrity through potentially vexatious litigation; the public's interest in maintaining an independent, uncoerced judiciary; and, the individual's interest in correcting errors. In weighing the various interests, the Court relied upon the fact that the individual could redress error through the appeal process.

The Court has adhered to the same method for balancing the three interests in its cases dealing with other official immunities. In *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974), the Court of Appeals for the Sixth Circuit had upheld the dismissal of an action filed against members of the state executive branch of Ohio, including the Governor. The Sixth Circuit had relied upon a concept of absolute immunity for protecting those officials from personal liability. The Supreme Court, in reversing the Sixth Circuit, discussed the policy behind the doctrine of immunity and concluded that only a qualified immunity existed.

The Court began its analysis by recognizing that

> it is important to note, even at the outset, that one policy consideration seems to pervade the analysis: the public interest requires decisions and action to enforce laws for the protection of the public.

Id. at 241.

The Court then compared the responsibilities of various public officials:

> Public officials, whether governors, mayors or police, legislators or judges, who fail to make decisions when they are needed or who do not act to implement decisions when they are made do not fully and faithfully perform the duties of their offices. Implicit in the idea that officials have some immunity—absolute or qualified—for their acts, is a recognition that they may err. The concept of immunity assumes that it is better to risk some error and possible injury from such error than not to decide or act at all.

Id. at 241-42.

High executive officers were then compared with police officers and judges. The Court recognized that police officers have never possessed absolute immunity for their actions, citing *Pierson* v. *Ray*, 386 U.S. 547, 555 (1967). On the other hand, citing an early Supreme Court decision, *Spalding* v. *Vilas*, 161 U.S. 483, 498 (1896), the Court recognized that

> the same general considerations of public policy and convenience which demand for judges of courts of superior jurisdiction immunity from civil suits for damages arising from acts done by them in the course of the performance of their judicial functions, apply to a large extent to official communications made by heads of Executive Departments when engaged in the discharge of duties imposed

> upon them by law. The interests of the people require that due protection be accorded to them in respect of their official acts.

416 U.S. at 246 n. 8.

While granting high executive officials a broader immunity than police officers and other public officials with less responsibility, the Supreme Court refused to grant absolute immunity since this would upset the balance of interests at the expense of the individual.

> [S]ection 1983 would be drained of meaning were we to hold the acts of a governor or other high executive officer have 'the quality of a supreme and unchangeable edict, overriding all conflicting rights of property and unreviewable through the judicial power of the federal government.'

Id. at 248.

In its next term, the Court refused to extend absolute immunity to school board officials. *Wood* v. *Strickland*, 420 U.S. 308 (1975). In reaching its decision, the Court once again weighed the competing interests and the effect of its action:

> But at the same time, the judgment implicit in this common-law development is that absolute immunity would not be justified since it would not sufficiently increase the ability of school officials to exercise their discretion in a forthright manner to warrant the absence of a remedy for students subjected to intentional or otherwise inexcusable deprivations.
>
> *Tenney* v. *Brandhove*, *Pierson* v. *Ray*, and *Scheuer* v. *Rhodes* draw upon a very similar judgment in construing § 1983.

Id. at 320-21.

Thus the policy considerations enunciated by the Supreme Court in its decisions involving judicial immunity have recently been applied to situations involving other officials. The trend of decisons by this Court should not

place judges in a position of absolute immunity while other officials, including Governors and even Presidents,[75]

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[75] In *United States* v. *Nixon*, 418 U.S. 683 (1974), the Supreme Court refused to uphold a claim by the President of the United States that tape recordings and documents relating to his conversations with aides and advisers were protected by absolute executive privilege. A key argument by the President involved the effect withdrawing executive privilege would have on the performance of his aides and advisers and on his decision-making process, arguing that the privilege was consistent with the public interest. The Court unanimously rejected this argument and Chief Justice Burger, writing for the Court, explained the Court's reasoning.

> The expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference for the privacy of all citizens and, added, to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decision-making. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of a Government and inextricably rooted in the separation of powers under the Constitution.

Id. at 708.

After stating the interests of the President and the public, the Court weighed the interests of the individual:

> But this presumptive privilege must be considered in light of our historic commitment to the rule of law.

Id.

As the Court held, the privilege afforded the President is not absolute and must give way to countervailing policy arguments.

> [The Court] must weigh the importance of the general privilege of confidentiality of Presidential communications in performance of the President's responsibilities against the inroads of such a privilege on the fair administration of criminal justice . . . . [T]he allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts.

Id. at 711-13.

are not so protected. *Amicus* asserts that the public policy must be fully considered in this case, as it has been in others.

B. Judicial Immunity Should Not Protect Judge Stump Where His Actions Deprived Linda Sparkman of Her One Basic Protection, the Right to Appeal.

1. *The Doctrine of Judicial Immunity Rests Significantly Upon the Individual's Rights of Appeal.* In *Pierson* v. *Ray*, 386 U.S. 547 (1967), the Court held the doctrine of judicial immunity applicable to actions brought against judges under 42 U.S.C. § 1983. However, the Court upheld immunity only after a careful balancing of the competing interests. With regard to the interests of the individual litigant, the Court succinctly stated:

> [A judge's] errors may be *corrected on appeal*, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption.

Id. at 554 (emphasis added).

The Court perceived that a litigant, unsatisfied with a judge's decision, could attempt to overturn that decision on appeal. The Court found the right to appeal to be ample protection for the individual, negating any need for abrogating judicial immunity in a civil action.

In *Pierson*, the Court followed its earlier decision in *Bradley* v. *Fisher*, 13 Wall. 335, 20 L. Ed. 646 (1872). There, the Court recognized that an individual's proper recourse was through the process of appeal.

> Against the consequence of their erroneous or irregular action, from whatever motives proceeding, the law has provided for private parties numerous remedies, and to these remedies, they must, in such cases, resort.

13 Wall. at 354, 20 L. Ed. at 646.

The rationale for permitting judicial immunity because of the existence of appeal rights dates back to the origins of the doctrine itself in English common law. In *Yates* v. *Lansing*, 5 John. 282 (N.Y. 1810), the court summarized the English tradition of supporting judicial immunity, citing the early English case of *Hammond* v. *Howell*, 1 Mod. 184, 2 Mod. 218.

> [T]hat though the defendant acted erroneously, he acted judicially, and if what he did was corrupt, complaint might be made to the king, and if erroneous, it might be reversed.

5 John. at 294.

As a forerunner to its decision upholding judicial immunity in *Pierson* v. *Ray*, the Court, in *Tenney* v. *Brandhove*, 341 U.S. 367 (1951), held that 42 U.S.C. § 1983 did not abrogate the official immunity of legislators. In his detailed analysis of the decision, Justice Black explained the holding of the case:

> It is not held that the validity of legislative action is coextensive with the personal immunity of the legislators. That is to say, the holding that the chairman and other members of the Committee cannot be sued in this case is not a holding that their alleged persecution of Brandhove is legal conduct. Indeed, as I understand the decision, there is still much room for challenge to the Committee action. Thus, for example, in any proceeding instituted by the Tenney Committee to fine or imprison Brandhove on perjury, contempt or other charges, he would certainly be able to defend himself on the ground that the resolution creating the Committee or the Committee's actions under it were unconstitutional and void.

Id. at 379-80 (Black, J., concurring).

Thus, in *Tenney* the Court, while upholding immunity, weighed the public policy considerations to insure that

the individual was not totally without other opportunities for redress. The right to challenge the action before another body is, thus, an integral part of the rationale supporting the doctrine of immunity.

Several commentators who have examined the doctrine of absolute judiciary immunity have recognized that the right to appeal is an essential element of its justification.[76] Numerous courts,[77] including this

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[76] While criticizing the doctrine on the basis that the right to appeal is not a sufficient protection for the individual, these authors make clear that the right to appeal is implicit in a finding of immunity. Thus, one author concludes:

> Doubtless such judgments are 'reviewable' on appeal. But appellate review may be long-delayed and costly beyond the means of many litigants.

Kates, Jr., *Immunity of State Judges Under the Federal Civil Rights Acts: Pierson* v. *Ray Reconsidered*, 65 Nw. U. L. Rev. 615, 629 n. 43 (1970).

Similarly, a second author concludes:

> An individual or group facing litigation which is intended only to harass will take little comfort indeed from his 'right' to appeal. Whether or not the appeal vindicates the abused party, the inconvenience and expense of litigation remains.

Note, *Liability of Judicial Officers Under Section 1983*, 79 Yale L. J. 322, 330 (1969).

An early analysis of judicial immunity also acknowledged that the traditional justification for granting judicial immunity rests upon the availability of alternative means of redress.

> The existence of adequate opportunities for change of venue, new trial, or reversal on account of prejudice or error, thereby minimizes the need, as against judges not of last resort, of an additional tort liability.

Jennings, *Tort Liability of Administrative Officers*, 21 Minn. L. Rev. 263, 272 (1937).

[77] Through the use of the LEXIS computer system, *amicus* has located 412 federal cases since 1935 dealing with judicial immunity. With the exception of the case at Bar and *Wade* v. *Bethesda Hospital*, 337 F. Supp. 671 (S.D. Ohio 1971), where the judge was also held liable, no other case has a similar factual situation. The case

Court,[78] in considering the issue of official immunity have followed the Court's reliance in *Pierson* upon the existence of a right of appeal as the foundation for the doctrine. For example, the Court of Appeals for the Fifth Circuit, while upholding absolute judicial immunity, reasoned,

> [We] are mortified by the spectre of deprivations of the civil rights of our citizenry. But when the infringement comes at the hands of a judge, our system offers its own built-in corrective—the improprieties of judges may be attacked and *appealed from*, either directly or collaterally.

McAlester v. *Brown*, 469 F.2d 1280, 1283 (5th Cir. 1972) (emphasis added).

Thus, whether the doctrine of absolute judicial immunity is being supported or attacked, each court and each author accepts the basic inherent safeguard provided by our judicial system, the right to appeal. *Amicus* argues that where that right to judicial review does not exist, the policy reasons for upholding immunity fall.

2. *The Total Absence of Procedural Due Process—Including Lack of Notice, Hearing, Counsel, and Notice of Decision—Effectively Deprived Linda Sparkman of the Protection of Judicial Appeal.* Judge Stump authorized a tubal ligation on Linda Sparkman by signing the petition presented to him by Ora McFarlin, her mother. Based upon the petition, the hospital and doctors performed the irreversible operation.

Linda Sparkman was not served notice of the proposed action against her, even though the result would be to deprive her of her fundamental right to procreate.

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at Bar is even more narrow than *Wade* in that it is the only case in which the actions of a judge clearly abrogated the right to appeal.

[78] *Scheuer* v. *Rhodes*, 416 U.S. 232, 244 (1974).

Neither counsel nor a guardian ad litem was appointed to represent Linda Sparkman's interests, despite the fact that she was a minor and allegedly "somewhat retarded." Judge Stump did not hold a hearing by which he could determine whether any justification existed for the drastic procedure. After Judge Stump signed the petition, he made no attempt to serve Linda Sparkman with notice of his Order; in fact, no official court file was even opened.

As a result Linda Sparkman was totally unaware of what had transpired between her mother and Judge Stump. She was totally unaware that she was to undergo tubal ligation. She was totally unaware that she would subsequently be unable to bear children. And, being unaware of all this, Linda Sparkman was unable to rely upon her judicial right of appeal. She was afforded no opportunity whatsoever to raise any objections to Judge Stump's action.

As result of Judge Stump's action, Linda Sparkman was deprived of all remedies. *Amicus* submits that the Court should clearly recognize that its delicate balancing of interests, consistently employed, has been irrevocably upset and that to shield Judge Stump with absolute immunity would be inconsistent with the prior reasoning of this Court.

C. Public Policy Would Be Well Served by an Affirmance of the Lower Court's Decision.

A finding by this Court that Judge Stump's actions are not to be shielded by the doctrine of judicial immunity is a narrow one. When the judicial system operates properly, trial court judges do not make drastic, irreversible decisions which are not subject to judicial review. An affirmance of the Seventh Circuit's decision need not open "the floodgates of litigation."

While the issue of judicial immunity is a narrow one in this case, Linda Sparkman's substantive rights are substantial.

As a result of the ill-founded eugenics movement, tens of thousands of our Nation's mentally retarded citizens were unnecessarily sterilized. While not of the magnitude of Germany's shame, our own history is not filled with pride.

A half century ago, the Supreme Court, speaking through Justice Holmes, enunciated a misguided understanding of mental retardation in *Buck* v. *Bell*, 274 U.S. 200 (1927).

> We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who have already sapped the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetents. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover the cutting of the Fallopian tubes. . . . Three generations of imbeciles are enough.

Id. at 207.

It is now understood that mentally retarded persons, who are seeking their rightful place in society's mainstream, can be deeply affected by the involuntary sterilization process. Dr. Philip Roos, Executive Director of the National Association of Retarded Citizens, recently wrote that "mentally retarded persons apparently do not generally accept sterilization gladly as once assumed." [19]

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[19] Roos, *Psychological Impact of Sterilization on the Individual*, Law & Psychology Rev. 45, 50 (Spring, 1975).

Dr. Roos outlines a psychological impact of sterilization which often "symbolizes punishment and may be synonymous in their minds with castration." [80]

While this case does not require the Court to make pronouncements with regard to the full extent of necessary protections which should be afforded individuals as to whom involuntary sterilization is sought, *amicus* believes that this Court's decision may affect such processes. While medical and social science thinking has changed substantially over the past several decades, many handicapped individuals continue to be adversely affected by the stereotypes which have continued beyond the scientific demise of the eugenics movement.

While involuntary sterilization is decreasing as a practice, in large part due to the sensitive response of the judiciary, sterilization is still subject to abuse.[81] This Court has recognized that "[t]he power to sterilize, if exercised, may have subtle, far-reaching and devastating effects." *Skinner* v. *Oklahoma*, 316 U.S. 535, 541 (1942). While an affirmance of the Seventh Circuit in this case will not open the "floodgates of litigation," *amicus* believes that a reversal of the Seventh Circuit may be read as a reaffirmation by this Court of the now disproved notions which received support in *Buck* v. *Bell*.

Amicus asks this Court to recognize that "[t]he central importance of the family to our way of life transcends all cultural boundaries—ethnic, religious, social, and economic. Neither does the desire to have children diminish with handicapping conditions." [82] In balancing the various interests in the doctrine of judicial immunity,

[80] *Id.* at 48.

[81] Soskin, *Voluntary Sterilization—Safeguarding Freedom of Choice*, 2 Amicus 50 (February, 1977).

[82] Linn, *Involuntary Sterilization—A Constitutional Awakening to Fundamental Human Rights*, 2 Amicus 35 (February, 1977).

this Court is asked to weigh heavily the interest which the public holds in the right to bear and beget children.

Amicus also asks this Court to consider the interest which society has in assuring a judicial system wherein the actions of any one member of the bench are always open to reasoned review. In balancing the public's interest in this case, *amicus* argues that a finding that Judge Stump is shielded by judicial immunity from the action brought by Linda Sparkman would be to sanction tyranny from the bench.

CONCLUSION

For the reasons discussed in this brief, *amicus* respectfully requests this Court to affirm the decision of the Court of Appeals for the Seventh Circuit, which would return this matter to the District Court for a trial on the merits.

Respectfully submitted,

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